UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

LINCOLN LUTHERAN OF RACINE Case No. 30-CA-111099

And

SERVICE EMPLOYEES INTERNATIONAL UNION
HEALTHCARE WISCONSIN

REPLY BRIEF TO BRIEF OF AMICUS CURIAE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.

Linda L. Harfst, Esq.
Cullen Weston Pines & Bach LLP
122 West Washington Avenue
Suite 900
Madison, WI 53703

(608)251-0101

Attorney for

SEIU HEALTHCARE WISCONSIN (SEIU HCWI)

Amicus Curiae National Right to Work Legal Defense Foundation ("the Foundation,") consistent with its opposition to what it views as "compulsory unionism,"[1] in a "forced dues state,"[2] argues that the National Labor Relations Board's ("the Board's") long-standing precedent regarding dues deduction in *Bethlehem Steel*[3] must be preserved. This brief demonstrates that the Foundation's position is inconsistent with the declared policy of the Act. As well, the Foundation's position is not well-reasoned; rather, a view consistent with that expressed in *WKYC-TV* is sound and persuasive. The Board now should explicitly adopt *WKYC-TV*'s reasoning.

1. *WKYC-TV's* Holding Regarding Dues Collection Correctly Follows The Policies And Principles Of Collective Bargaining As Set Forth In The Act, Contrary To The Foundation's Allegations That Doing So Would Undermine The "Fundamental Principle Of Voluntary Unionism."

The Foundation claims that the ability to choose freely whether to join or support a union, or to not join or support a union, is the paramount interest protected by the NLRA.[4] On the contrary, the citations that Foundation's counsel uses to support these statements reflect only a portion of Section 7 of the Act, 29 U.S.C. § 157. An authoritative source to express the interests protected by the Act is its Findings and Declaration of Policy, which reads, in its concluding paragraph:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of

---

[1] Foundation's brief, p. 1, line 3; p. 6 line 4.
[2] Foundation's brief, p. 3 line 2.
[3] *Bethlehem Steel*, 136 NLRB 1500 (1962).
[4] Foundation's brief p. 5, lines 10-11.

> representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.[5]

After asserting, inaccurately, that choosing freely whether or not to join a union is the paramount interest protected by the Act, the Foundation then leaps to the assertion that, "requiring that employers continue to extract union dues from employees when there is no contract, and potentially when the union is on strike, is inconsistent with this principle of voluntary unionism."[6]

The Foundation totally ignores that, having chosen freely that they want to form a union, and having succeeded in doing so, the employees who made this free choice might want to continue to have their chosen union representatives represent them, and that they would be willing to pay dues money to do so.

The Foundation makes much of the argument that "It violates commonsense to think that employees who signed a dues deduction authorization only because of a forced unionism clause would want their employer to continue taking their money, and handing it over to union officials, when they are not forced to pay to keep their jobs."[7] However, the Foundation produces no factual documentation for its assertions. The citation consists of a speculative argument from another case.[8]

Counsel for the Foundation asserts, "In short, *Bethlehem Steel* and its fifty years of progeny should not be overruled, because permitting employers to stop deducting

---

[5] 29 U.S. Code § 151, Concluding paragraph.
[6] Foundation's Brief p. 5.
[7] Foundation's brief p. 6.
[8] See footnote 22 on page 6 of Foundation's brief.

union dues when a contract expires protects employee Section 7 rights."[9] The Foundation's argument presumes that the only employee rights that matter are the rights of those who may be opposed to being in a union. But ending dues deduction does nothing to protect the rights of the majority of workers who chose to form the union. Enforcing the rights of the minority and starving the collective bargaining process that the law itself makes a priority, by ending dues deduction, does nothing to "encourage the practice and procedure of collective bargaining . . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection," which is the underlying policy of the law.[10] The Foundation's argument is counter to the very purposes of the Act itself.

The Foundation quotes the dissent of then-NLRB member Brian Hayes in *WKYC-TV* for his rejection of the proposition that union members' ability to revoke their dues deduction adequately protects their Section 7 rights. His claim that employees would be unlikely to recall the revocation language in their authorizations, and his belief that they would not understand that their obligation to pay dues had terminated as a matter of law when the contract expired, is speculation. "Even if they do remember and understand, checkoff authorizations typically permit revocation only during brief annual window periods, and the working of the revocation language may be difficult to understand."[11] His dissent offers no factual basis for his claim that employees cannot

---

[9] Foundation's Brief p. 6.
[10] 29 U.S.C. § 151
[11] *WKYC-TV*, 359 NLRB No. 30 at 10-11 (Hayes, dissenting).

comprehend what they may do if they do not choose to pay dues.[12] Rather, since "the union is not likely to inform [the employee] otherwise" (an assertion with no citation support), the employer should be permitted to unilaterally stop dues deduction once the contract date enabling dues deduction has passed.[13]

The Foundation claims that, "Service Employees International Union Healthcare Wisconsin fails to provide a compelling argument to adopt WKYC-TV Inc.'s rationale to overturn *Bethlehem Steel.*"[14] However, the Foundation's position is inconsistent with the findings and declarations of policy in the Act itself, and would do nothing to further the law's objectives. It rests upon bias, not facts, regarding the motives and capabilities of the workers who have organized and selected a collective bargaining representative.

The Foundation cannot explain how it is that the employer expects to be vindicator of employees' rights. In *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996), the Supreme Court stated, "In any event, as the Supreme Court put it in another context, '[t]he Board is . . . entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union . . . . There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom.'"

---

[12] Language he quotes in *WKYC-TV* as being difficult to understand appears to derive directly from language in the Labor Management Relations Act, § 302(c)(4).
[13] *WKYC-TV*, supra, at 11.
[14] Foundation's Brief at 2.

2. The Foundation's claim in point heading A, p. 3 of its brief, asserting that dues check-off and union security clauses differ from other employment terms because these clauses exist only because of a collective bargaining agreement is neither factually nor legally correct.

In its decision in *WKYC-TV*, the Board established that it had "carefully considered" opinions in all of the prior litigation, which had stretched over a fifteen-year period.[15] Following that review, it found "compelling statutory and policy reasons"[16] to abandon the *Bethlehem Steel* rule on dues deduction. It announced,

> We accordingly hold that, like most other terms and conditions of employment, an employer's obligation to check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement. However, because employers, including the Respondent, have long relied on *Bethlehem Steel* in their dealings with unions, we find that it would be unjust to apply our new holding in pending cases. We shall therefore dismiss the complaint.[17]

a. [T]he Foundation claims that dues check-off and "union security" clauses become conditions of employment *only* through a collective bargaining agreement;[18] that reasoning is incorrect and was addressed and answered in *WKYC-TV*.

WKYC-TV discussed and demolished the claim that an employer's obligation to continue dues check-off ends with contract expiration. These key arguments from *WKYC-TV* specifically contradict the Foundation's assertions:

1. Dues check off falls within the general rule regarding mandatory subjects of bargaining, which requires that an employer must continue in effect contractually established terms and conditions of employment that are mandatory subjects of bargaining, until the parties either negotiate a new

---

[15] *WKYC, supra, at 1.*

[16] *Id.*

[17] *Id.*

[18] *WKYC-TV, supra,* at 4, citing *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B., 501 U.S. 190, 199 (1991); Southwestern Steel & Supply v. NLRB,* 806 F.2d 1111 (D.C. Cir. 1986)

agreement or bargain to a lawful impasse.[19] The Board in *WKYC-TV* saw no reason to make an exception to this general rule for dues deduction.[20] The decision described dues deduction as primarily an administrative convenience. No rights that the employees would otherwise enjoy were waived in order to obtain the dues deduction process. The decision contrasted dues deduction, which is voluntary, with other contractual terms such as arbitration provisions, no-strike clauses, and management rights clauses, for which the parties likely waived rights in order to obtain an agreement. Because of the existence of the waiver, these provisions do not survive the expiration of the labor contract.[21] The Board in *WKYC*-TV likened dues deduction instead to other voluntary check off agreements common in workplaces, such as employee savings accounts, and charitable contributions. These survive the contracts that established them.[22]

2. Next, *WKYC-TV* assessed the legislative source of union security clauses and dues check-off provisions, which *Bethlehem Steel* had linked closely in its analysis. It pointed out that the two concepts arose from different sources. Union security clause language appears in § 8(a)(3) of the Act, and dues check off, by contrast, arises from LMRA § 302(c)(4).

---

[19] *WKYC-TV, supra, at 2, citing Litton Fin. Printing Div. at 198-199.*
[20] *WKYC-TV, supra* at 3.
[21] *WKYC-TV, supra* at 3, and cites therein, particularly in fn. 11.
[22] *WKYC-TV, supra, at 3-4; see also cited quotation from Quality House of Graphics,* 336 NLRB 497, fn. 3(2001).

Although § 302(a) of the LMRA generally prohibits employer payments to unions, in § 302(c)(4), Congress exempted certain payments to unions, including dues check-off from that prohibition:

> The provisions of this section shall not be applicable .... with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner[.][23]

This provision is the only one that regulates dues check off. *WKCY-TV* pointed out that not only did the statute contain no words making dues check-off arrangements dependent on the existence of a collective bargaining agreement, but its legislative history indicates that the language's intent was to treat the dues check-off as an assignment from the authorizing employee. It was to continue indefinitely until revoked by the employee.[24] Thus, *WKYC-TV* determined that dues check-off should be included with the majority of terms and conditions of employment that remain in effect even after the contract containing them expires.

3. *WKYC-TV* did not reach the same conclusion with regard to union security clauses, however. *WKYC-TV* noted that in linking dues deduction provisions to union security clauses, the *Bethlehem Steel* decision ignored § 302(c)(4), discussed above, which clearly contemplates that dues check-off normally survives the expiration of a collective-bargaining agreement. By

---

[23] 29 U.S.C. § 186(c)(4)

[24] *WKYC-TV* at 4 – 5; see particularly fn. 17

contrast, § 8(a)(3) of the Act, which specifically links the legitimacy of a union-security agreement to the existence of a contract, is substantively different legally and factually than dues deduction. *Bethlehem Steel* was wrong in saying that union security agreements and dues check-off arrangements were so similar or interdependent that they must be treated alike.[25] Parties to a collective bargaining agreement have the option of negotiating either union security clauses or dues deduction provisions without the other. The experience in right-to-work states, where union security clauses are prohibited, but dues deduction clauses may be and are negotiated and implemented, demonstrates that "the undeniable reality is that union-security and dues-checkoff arrangements can, and often do, exist independently of one another."[26] If *Bethlehem Steel* had been correctly decided, presumably it would be as unlawful for an employer, postcontract expiration, to continue to honor a dues-checkoff arrangement as it would be to continue to honor a union-security arrangement after a collective bargaining agreement has expired. In fact, the Board has never prohibited an employer from continuing to check off dues after a contract expires.[27]

4. The dissent in *WKYC-TV* raises the same objection as the Foundation on p. 4 of its brief: the allegation that dues check-off and "union

[25] *WKYC-TV* at 6.
[26] *WKYC-TV* at 7.
[27] *Id.*

security" clauses become conditions of employment *only* through a collective bargaining agreement.

Citing their concurrence in *Hacienda III*, *WKYC-TV* cites then-Chairman Liebman and then-member Pearce, who point out that specific economic terms of a collective bargaining agreement, such as wage rates, are no less contractual requirements than is a dues check-off obligation, in that the agreement is the only source of the employer's obligations to provide those particular wages and benefits.[28]

b. The Foundation's argument on pages 1 and 2 of its brief that the *Bethlehem Steel*'s long-standing precedent should continue must be rejected, not only on the merits, but because the Board has taken subsequent action relying upon the principles articulated in WKYC-TV.

WKCY-TV reasons correctly that *Bethlehem Steel's* holding regarding dues deduction is unsupportable. Thus, its decision regarding *Bethlehem Steel,* to the extent that it stood for the proposition that dues checkoff does not survive contract expiration, articulated a much needed change. Any argument by the Foundation that the longevity of *Bethlehem Steel's* holding should nevertheless result in continuing that policy subsequent to the Supreme Court's decision in *Noel Canning,*[29] has been met by *WKCY-TV's* recognition that it is not lightly abandoning a policy: "We do not lightly abandon that policy. But we decline to keep following a course that has never been cogently explained - and in our view, cannot be."[30]

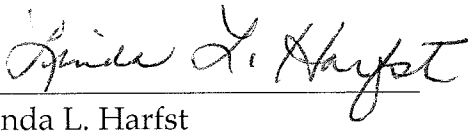
---

[28] *WKYC-TV* at 8, citing to *Hacienda Resort Hotel & Casino*, 355 NLRB 742, 743 (2010).
[29] *NLRB v. Noel Canning*, 134 S.Ct., 2550, 199 L.R.R.M. (BNA) 3685 (2014).
[30] Id, citing *Goya Foods of Florida*, 356 NLRB 184, Slip op. at 3 (2011).

In urging the Board to continue its reliance upon *Bethlehem Steel,* the Foundation also fails to recognize that the Board has, since being fully constituted, issued a decision in *Healthbridge Management LLC,* 360 NLRB 118 (May 22, 2014) in which it appears to adopt the reasoning of *WKYC-TV.* Because that new rule was to be applied prospectively only, the Board affirmed the Administrative Law Judge's decision. If *Healthbridge Management* signals approval of *WKYC-TV's* reasoning, then the position that the Foundation urges in its brief already has been rejected, but should be articulated expressly.

Dated at Madison, Wisconsin this 23rd day of October, 2014.

Respectfully submitted,



Linda L. Harfst
Counsel for the Union
SEIU Healthcare Wisconsin ("SEIU HCWI)
CULLEN WESTON PINES & BACH LLP
122 W. Washington Ave., Ste. 900
Madison, WI 53703

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

LINCOLN LUTHERAN OF RACINE Case No. 30-CA-111099

And

SERVICE EMPLOYEES INTERNATIONAL UNION
HEALTHCARE WISCONSIN

CERTIFICATE OF SERVICE

I, Heidi K. Buttchen, hereby certify that a copy of the Reply Brief to Brief of Amicus Curiae National Right to Work Legal Defense Foundation, Inc. in the above-captioned matter was served by email to Angela B. Jaenke, on behalf of General Counsel; John H. Zawadsky, on behalf of the Respondent; and John Raudabaugh on behalf of Amicus Curiae National Right to Work Legal Defense Foundation, Inc., on October 23, 2014.

Heidi K. Buttchen

Heidi K. Buttchen, Legal Assistant
Cullen Weston Pines & Bach LLP
122 West Washington Avenue, Suite 900
Madison, WI 53703
(608) 251-0101
(608) 251-2883
buttchen@cwpb.com

PROOF OF SERVICE

I declare I am at least eighteen years of age and not a party to this action. My business address is 122 W. Washington Avenue, Suite 900, Madison, Wisconsin 53703. All of the pages of the below-described document was sent to the recipients listed below by electronic mail, at the respective electronic mail addresses indicated thereon. On October 23, 2014, I served a copy of the following document:

Reply Brief to Brief of Amicus Curiae
National Right to Work Legal Defense Foundation, Inc.

On Behalf of the General Counsel:
Angela B. Jaenke, Esq.
310 W. Wisconsin Ave., Ste. 450W
Milwaukee, WI 53203
abjaenke@nlrb.gov

On Behalf of the Respondent:
John H. Zawadsky, Esq.
Reinhart, Boerner, Van Deuren, S.C.
22 E. Mifflin St., Ste. 600
Madison, WI 53703
jzawadsk@reinhartlaw.com

On Behalf of the Amicus Curiae
National Right to Work Legal Defense Foundation, Inc.:
John N. Raudabaugh, Esq.
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
jnr@nrtw.org

On Behalf of the Union:
Dian Palmer, President
Bonnie Strauss, Project Director
SEIU Healthcare Wisconsin
4513 Vernon Blvd. #300
Madison, WI 53705
dianp@seiuhcwi.org
bonnies@seiuhcwi.org

Heidi K. Buttchen

Heidi K. Buttchen